United States of America

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 160

NEIL E. REID, Circuit Judge of the Sixteenth Judicial Circuit, sitting in and for the County of Saginaw, Petitioner and Defendant Below,

vs.

SECOND NATIONAL BANK AND TRUST COMPANY, of Saginaw, Michigan, individually, and as Trustee under the Ninth and Tenth Paragraphs of the Will of Arthur D. Eddy, Deceased, and CHARLOTTE EDDY MORGAN, Respondents and Plaintiffs Below

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN AND BRIEF IN SUPPORT THEREOF

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CASE INDEX

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

To: The Honorable Harlan Fiske Stone, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your Petitioner respectfully shows:

SUMMARY OUTLINE OF FACTS

Suit was filed in the Michigan State Equity Court (hereinafter called "first suit") by the testamentary trustee and

against the life tenant (Doebler) and remainderman (Cleveland). A *co-cestui que* trust (Charitable Trust) was not made a party.

Defendant Cleveland then removed first suit to the Federal Court, where an amended complaint was filed by plaintiff Trustee.

No question of jurisdiction was raised.

The Attorney General of Michigan (statutory representative of the Charitable Trust) was not made a party.

Judgment was entered on February 7, 1939 (see Page 9, paragraph I (h) of Summary Statement of Matters Involved) and affirmed without opinion in 117 Fed. (2d) 1009.

Thereafter remainderman filed bill in equity in State Court (hereinafter called "second suit"), asking that the Federal Judgment in first suit be declared void on ground that Federal Court was without jurisdiction. Attorney General was made a party.

Testamentary Trustee then moved to dismiss second suit on ground that judgment in first suit was *res adjudicata.* Motion to dismiss was denied by Petitioner, Neil E. Reid, and an order was entered enjoining testamentary trustee.

Upon petition of testamentary trustee filed in Supreme Court of Michigan (and referred to in its opinion as "instant case") writs of prohibition and mandamus directed to the lower court (Petitioner Reid, Circuit Judge, presiding) were issued by the Supreme Court of Michigan, by a final judgment entered April 20, 1943. It is to review this action of the Michigan Supreme Court that this petition for certiorari is filed.

SUMMARY OF JURISDICTIONAL QUESTIONS INVOLVED IN THE FEDERAL JUDGMENT OF FEBRUARY 7, 1939

FIRST QUESTION: Did the Federal Equity Court have jurisdiction of the subject matter to:

(1) Take from the State Probate Court's prior control, the corpus of the testamentary trust estate over into the Federal Equity Court,

(2) Allow a Michigan Testamentary Trustee's final account and determine the residue passing to the remaindermen,

(3) Determine the Testamentary Trustee's Counsel Fees, and require payment from the trust corpus, and

(4) Then order the residue of the Trust Estate distributed in the Federal Equity Court to the remaindermen—

under a will and testamentary trust being administered since 1925 in the State Probate Court?

This Honorable Court has ruled against such claimed jurisdiction in *Princess Lida v. Thompson,* 305 U. S. 456, 467, and *Byers v. McAuley,* 149 U. S. 608, 615.

That this Federal Judgment of February 7, 1939, actually abstracted an entire trust estate and corpus out of the Michigan Probate Court's thirteen year control—is shown conclusively by the Probate Court's refusal to pass upon a petition for assignment of the residue—giving as a reason that it had lost all jurisdiction because of the Federal Judgment.

See the Probate Order of January 22, 1942 attached as Exhibit A to Petitioner's Answer on page 33, being Pleading B in the Certiorari Record.

SECOND QUESTION: Did the Federal Equity Court have power to enter a judgment against one *cestui que* trust (remainderman Cleveland) that she pay all the expenses of a Testamentary Trustee's final accounting suit—except $1,000 to be paid by a second *cestui que* trust, a Charitable Trust, which was not a party to the Federal Judgment at all?

(1) These jurisdictional questions were not raised by the parties to the Federal Court Judgment of February 7, 1939, either in the District Court or on appeal.

(2) But to test the validity of the Federal Judgment, Remainderman Cleveland filed an independent bill in equity in the Michigan State Equity Court on January 15, 1942, against the Testamentary Trustee.

(3) Petitioner for Writ of Certiorari, Neil E. Reid, Circuit Judge of the Saginaw Circuit Court, In Chancery, denied the Trustee's motion to dismiss and overruled its claim that the Federal Judgment was *res adjudicata* of this Second State Equity Suit.

(4) Thereupon the Testamentary Trustee (without reviewing petitioner's said order in the usual manner by appeal) filed a petition in the Supreme Court of Michigan on May 13th, 1942 for a Writ of Prohibition against Petitioner Reid.

(5) On February 23, 1943, the Supreme Court of Michigan filed an opinion (See Record, Pleading C) and on April 20, 1943 entered a judgment of prohibition (see Record, Pleading F) the basis of which Supreme Court's opinion and judgment being that Remainderman Cleveland was estopped to question the lack of jurisdiction of the subject matter of the Federal Equity Court to enter the Federal Judgment of February 7, 1939.

(6) This Ruling of Estoppel made by the Supreme Court of Michigan is directly contrary to the Rule of this Honorable Supreme Court of the United States, as announced in the leading case of—

Vallely v. Insurance Company, 254 U. S. 348.

PRELIMINARY DISCUSSION OF THE OPINION AND JUDGMENT OF THE SUPREME COURT OF MICHIGAN

The Highest Michigan Court granted a Writ of Prohibition against Petitioner for Writ of Certiorari, Neil E. Reid, Circuit Judge, forbidding further proceedings in the second suit of *Cleveland v. Second National Bank and Trust Company,* as Trustee (filed to test the validity of the Federal Judgment) on two main grounds, namely:

(1) That remainderman Cleveland (plaintiff in this second equity suit) *was estopped* to raise the question of lack of jurisdiction of the subject matter, since no party to the Federal Judgment raised the question in the Federal Court "first suit."

(2) That a Michigan Equity Court had power to construe the last Will of the Testator, which created the trust estate here involved.

This second reason, given by the Supreme Court of Michigan, is of no importance, however, for the Court *did not determine* that the Powers of the Michigan Probate Court were not "adequate" to decide all issues and questions, which the Federal Judgment determined and provided for.

Consequently, the Supreme Court of Michigan *did not decide on the merits* whether a Michigan Equity Court (State or Federal) would have had jurisdiction of the

subject matter to enter the Federal Judgment of February 7, 1939.

The unvarying rule is that as to all matters of administration of all decedents' Estates and Testamentary Trusts—the State Probate Court has exclusive jurisdiction, unless the powers of the Probate Court are "inadequate." *Brooks v. Hargrave,* 179 Mich. 136, and *Gillespie v. Schram,* 108 Fed. (2d) 39 (6 C. C. A.).

Moreover the Testamentary Trustee's amended bill, upon which the Federal Judgment was entered, *tendered only a* testamentary trustee's final accounting, and the question raised was "as to administration and restoration of corpus," as this Honorable Court said in its opinion in *Princess Lida v. Thompson,* 305 U. S. 456 at page 467, holding the Federal Equity Court to be without jurisdiction of the subject matter in that case.

THUS THE SUPREME COURT OF MICHIGAN'S JUDGMENT VIOLATES SEVERAL WELL SETTLED RULES OF THIS HONORABLE COURT IN THAT:

First: Jurisdiction of the subject matter cannot be conferred upon the Federal Court by estoppel or consent (254 U. S. 348).

Second: Distribution of a decedent's estate, in course of administration in the State Probate Court, cannot be made by a Federal District Court (149 U. S. 608).

Third: A State Probate Court's duly appointed Testamentary Trustee's management of the corpus of the Trust cannot be approved by a Federal District Court (305 U. S. 456).

Fourth: Such State Court's Testamentary Trustee's fees and counsel's expenses cannot be approved by a Federal District Court.

Fifth: A Federal Judgment cannot be made *res adjudicata* of the second suit, where claims are made against a charitable trust for contribution of trustee's expenses, which charitable trust was not a party to the Federal Judgment.

Sixth: Any equity court, State or Federal, has the power to set aside any judgment, State or Federal, procured by fraud—and no Highest Court of a State should by writ of prohibition deny a trial on the merits of such charges previously admitted by motion to dismiss—

when the judgment attacked is a Federal Court Judgment.

SUMMARY STATEMENT OF MATTERS INVOLVED

I. (a) The Equity Complaint filed in the Michigan State Equity Court on January 15th, 1942 (called "Second Suit") challenged the jurisdiction of the Federal District Court to enter its judgment of February 7, 1939, in a Testamentary Trustee's Final Accounting suit in equity—on the ground that the State Probate Court had prior exclusive jurisdiction of the res. See *Princess Lida v. Thompson,* 305 U. S. 456.

(b) The equity suit resulting in this Federal Judgment (called "First Suit") was commenced in the State Equity Court by the Testamentary Trustee —asking a judgment against remainderman legatee, Cleveland, that her legacy was only the par value of her family holding company's shares of $20,833, whereas their actual appraised value was $616,000 at the death of remainderman's uncle, the Testator, in 1925.

(c) Remainderman legatee, Cleveland, removed the first suit to the Federal Equity District Court (Eastern District of Michigan, Northern Division).

(d) Thereupon the Testamentary Trustee abandoned this effort (to enter a judgment that the corpus of remainderman Cleveland's one-sixth interest in the estate was only the small par value of $20,833; see prayer G in the Testamentary Trustee's original complaint in the "first case" in Record Pleading A, page 25), and filed an amended complaint (see Pleading A, Page 41) admitting large losses in the years of 1925 to 1935—during the life estate pendency—and asked exoneration on the ground of the depression.

(e) No party to the Federal Equity "first suit" raised the question of the lack of jurisdiction of the subject matter, of a Federal Equity Court in Michigan to pass upon a State Probate Court's Testamentary trustee's final accounting of its management of the corpus of the trust.

(f) (1) Mr. Eddy's will gave a Charitable Trust one-half of all the shares in the family corporation, these shares being worth $1,800,000 at testator's death, and remainderman Cleveland was left one-sixth of the company's shares, worth $616,000.

(2) The Charitable Trust was not a party to the Federal Equity suit (first suit) and the Testamentary Trustee admitted it had lost about $400,000 of the charitable trust corpus out of a total of $1,800,000.

(g) Remainderman Cleveland called the attention of the Federal Equity District Court during final hearing that the Attorney General of Michigan was not made a party to the first case—he being by Statute named to represent all charitable trusts in all litigations in the Courts of Michigan.

(h) This failure to have the Charitable Trust represented in the first suit was ignored by the Fed-

eral District Court, which entered a judgment on February 7, 1939:

(1) That the Trustee had lost nothing of legatee Cleveland's legacy of $616,000, because the small par value shares of the family corporation were the corpus of the Trust.

(2) That the Trustee had lost nothing of the Charitable Trust's legacy of about $1,800,000 of original value of assets of the family corporation, for the same reason, *and notwithstanding that no one was in Court to represent this Charitable Trust.*

(3) That legatee Cleveland must pay all the Trustee's legal expenses and accounting expenses (except $1,000 to be paid by the Charitable Trust) because the legatee Cleveland had asked a justification by a Testamentary Trustee of its admitted losses of over $125,000 of her legacy out of a total appraised value of $616,000.

(4) That these attorneys and accounting fees be submitted to the Federal Equity Court for approval and legatee Cleveland's one-sixth legacy be impounded in the Federal Equity Court until such assessed expenses were paid by her.

(5) That the corpus of the Trust under the Ninth Paragraph of Mr. Eddy's will, which had been within the jurisdiction and control of the State Probate Court ever since 1925 (and annual accountings thereof made to said Probate Court by the Testamentary Trustee for thirteen years) be lifted bodily out of the State Probate Court and into the Federal Equity Court—and administered and distributed under the Federal Equity Judgment of February 7, 1939.

II. In January, 1942, remainderman Cleveland (as Plaintiff in the second suit) filed a bill in equity in the State Saginaw County Circuit Court in Chancery against (1) the Testamentary Trustee, (2) the State of Michigan's Attorney General and the Saginaw County Prosecuting Attorney—appointed by Statute to represent the Charitable Trust—asking

(a) That the Federal Equity Judgment of February 7, 1939, be declared void as without the jurisdiction of the Federal Equity Court to hold a Testamentary Trustee's final accounting of its management of a decedent's trust estate, and to order a distribubution thereof after an assessment by the Equity Court of claimed trustee's counsel fees.

(b) That the Testamentary Trustee be enjoined from asking approval of its counsel fees by the Federal Equity Court—since the Statutes of Michigan required that all testamentary Trustee's counsel fees be approved by the Probate Court, which appointed such Trustee.

(c) That if remainderman Cleveland's legacy should and must pay any part of such claimed Trustee's counsel fees—then that proper, equitable contribution thereof might be decreed against the Charitable Trust, since legatee Cleveland's efforts in her own defense were of assistance in protecting the three times as great interests of the Charitable Trust —which Charitable Trust was now a party in Court— for the first time—in this second suit.

(d) That affirmance of this Federal Judgment of February 7, 1939, was obtained by the fraud and false statements of value of remainderman Cleveland's legacy, made by the Testamentary Trustee to the Sixth Circuit Court of Appeals on oral argu-

ment of her appeal in open court—all of which charges of fraud had been admitted by the Trustee's motion to dismiss filed in this second suit.

III. The Testamentary Trustee moved to dismiss the legatee Cleveland's said second suit bill—on the ground that the Federal Equity Judgment of February 7, 1939, in the first suit was *res adjudicata* of the second suit.

The Lower State Equity Court, Neil E. Reid, Circuit Judge, presiding (petitioner herein for writ of certiorari) denied this motion to dismiss—and issued an injunction against the Testamentary Trustee restraining it from asking approval of its claimed attorneys' fees by said Federal Equity Court or by any Court except the Saginaw Probate Court, which had appointed the Testamentary Trustee.

IV. Thereupon the Testamentary Trustee filed in the Supreme Court of Michigan, on May 13th, 1942 a petition for writs of prohibition and mandamus against said Neil E. Reid (Petitioner for writ of certiorari herein) to prohibit him—

(1) from further proceeding in said second suit to hear and decide the issue of *res adjudicata* by reason of said Federal Equity Judgment of February 7, 1939, in said first suit.

(2) from hearing or deciding on the final hearing on the merits of legatee Cleveland's charges of fraud by said Testamentary Trustee in the procurement and affirmance of said Federal Equity Judgment of February 7, 1939.

(3) and mandamus to compel petitioner herein, Neil E. Reid, to dissolve his temporary injunction restraining the Testamentary Trustee from further

proceeding in the Federal Equity Court under said Federal Judgment of February 7, 1939, for approval of the claimed attorneys' fees of said Testamentary Trustee.

V. After petitioner for Certiorari herein, and defendant in said Michigan Supreme Court Prohibition suit (Neil E. Reid) had enjoined (in said second equity suit) the Testamentary Trustee from attempting to obtain approval of the Trustee's attorneys' fees in the Federal Equity Court under the Federal Judgment of February 7, 1939, in the first suit—said Trustee actually abstracted over $40,000 from the assets of the family corporation—C. K. Eddy and Sons, and actually paid this money to itself (while it controlled the family corporation's assets) and then this Testamentary Trustee went into the Saginaw Probate Court (which had appointed it as Trustee in 1925) and asked this Probate Court to approve this payment of its counsel fees.

VI. A Chronological history of these attempts of this Testamentary Trustee to obtain heavy counsel fees from *cestui que* trust Cleveland, which the Trustee sued in the first suit in an effort to obtain a judgment that her rights under her Uncle's will were limited to $20,833 of par value shares (which judgment would have permitted automatically the Trustee to lose her entire surplus of nearly $600,000 through its mismanagement) is as follows:

1st—The Trustee went into the State Probate Court and obtained part allowance and approval of these counsel fees—namely, $1,500 in January, 1939, in one of its Trustee's accounts—thus placing the subject matter of such claimed Trustee's Counsel fees within the exclusive jurisdiction of the State Probate Court —see 305 U. S. 456, at pages 467 and 468.

2nd—Then the Testamentary Trustee entered the Federal Judgment of February 7, 1939—which attempted to take all the corpus of remainderman Cleveland's trust estate over into the Federal Equity Court —and to give the Federal Equity Court power to determine the claimed counsel fees—contrary to this Honorable Court's decision in *Taylor v. Sternberg,* 293 U. S. 470, syl. 6.

3rd—Thereafter, the Testamentary Trustee again on May 7th, 1942, went into the State Probate Court (see its annual account, dated May 1, 1942, and attached as Exhibit B to petitioner Reid's answer to the petition for Writs of Prohibition and Mandamus, in Record Pleading B, Page 35 thereof) and asked the State Probate Court to approve its abstraction from the Trust Estate Corpus of $35,000 as payments made of these so-called counsel fees to Messrs. O'Keefe and Grant. Of these payments made by the Trustee, $6,500 was made to a retired attorney, Mr. Grant, (upwards of eighty years of age) for sitting in the Federal Court on twelve days, and who never asked a question or addressed the Court—and who wrote no brief or argument or memorandum to the Court at any time, as appears by the Record on Appeal in first suit, and filed in the Supreme Court of Michigan in the second suit.

VII. EFFECT OF FEDERAL JUDGMENT OF FEBRUARY 7, 1939 IN THE FIRST SUIT.

(a) Mr. Eddy's will specifically gave the Testamentary Trustee the power to dissolve the nominal par value share family holding company "and discontinue C. K. Eddy and Sons as a corporation * * *." (Pleading A, page 39, Paragraph 12 of the Will.)

(b) The Testamentary Trustee's pleadings in the Federal Equity first suit prayed specifically that the family corporation (C. K. Eddy and Sons) be dissolved and its assets distributed under the will—one-sixth to residuary legatee Cleveland. See Record, Pleading A, pages 136, 137, 152. This pleading of the Trustee was an election under the will to dissolve the family corporation and distribute its assets among the legatees, which election is permitted by Paragraph 12 of the will, see Pleading A at page 39.

(c) Residuary legatee Cleveland was made a party defendant in this Federal Equity first suit, but the Charitable Trust (given three times as many shares in C. K. Eddy and Sons by Mr. Eddy's will, as was remainderman Cleveland) was not made a party.

(d) The Trustee's amended bill filed in the Federal Equity first suit in March, 1935 (see Pleading A, R. page 41) admitted heavy losses in the years of 1925 to 1935 in legatee Cleveland's one-sixth interest and tendered a testamentary trustee's final (Probate) accounting of its Trustee's management of the trust corpus (namely the itemized assets of the family corporation) and asked the Federal Equity Court to absolve it from a Trustee's liability for such losses, on the ground that a depression had occurred in 1930 to 1935—five years after the testator's death in 1925. See paragraphs 8 and 9 of the amended bill at Record pages 45 and 46, Pleading A.

(e) The legatee Cleveland answered and demanded the Trustee justify such admitted losses—the legatee remainderman Cleveland being so entitled. See *Davidson v. Young,* 290 Mich. 266.

(f) No question as to the Federal Equity Court's jurisdiction or power to hold a Testamentary Trus-

tee's management of trust assets (probate court) final accounting—was raised by any party.

(g) On February 7, 1939—the Lower Federal District Court entered its judgment providing that remainderman Cleveland was entitled to only the one-sixth par value family company shares and not one-sixth of all the separate valuable assets of the family company, appraised at a net value of $616,000 (for her one-sixth interest) at testator's death in 1925.

Thus— this Federal Equity Judgment of February 7, 1939, deprived legatee Cleveland of her right to control her own one-sixth of the family company's assets—and made her perpetually a minority stockholder in a three stockholder perpetual, charitable trust corporation, controlled by this Testamentary Trustee.

VIII. GROUNDS OF SUPREME COURT OF MICHIGAN'S JUDGMENT OF APRIL 20, 1943, IN THE SECOND SUIT, ISSUING WRIT OF PROHIBITION AGAINST PETITIONER FOR CERTIORARI HEREIN, NEIL E. REID.

(1) After oral argument and briefs—the Supreme Court of Michigan granted Writs of Prohibition and Mandamus (in an opinion, Pleading C) based on three reasons:

(a) That legatee Cleveland was estopped in the second suit to claim that the Federal Equity Judgment of February 7, 1939 in the first suit was void as without the jurisdiction of the subject matter of a Federal Equity Court.

(b) That it was thus unnecessary to pass on the Trustee's plea in the second suit of *res adjudicata* of the Federal Judgment of February 7, 1939.

(c) That although it had always been the unvarying Rule in Michigan that a Court of Equity had no jurisdiction over a Decedent's Estate or Will unless the power of the Probate Court was "inadequate," it was not necessary to decide the question of "adequate" jurisdiction and power of the Probate Court—because the remainderman Cleveland *was estopped* by her participation in the Federal Equity first suit and judgment of February 7, 1939 (as a party defendant) to question its validity for claimed lack of jurisdiction of the subject matter.

Upon such reasoning, the Supreme Court of Michigan based its judgment of April 20, 1943, and the issuance of the Writ of Prohibition against Petitioner for Writ of Certiorari—and review of which final judgment is sought in this Honorable Court.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

I. The Supreme Court of Michigan confused and misapplied the issues in legatee Cleveland's second suit to test the validity of the Federal Judgment in the first suit for total lack of jurisdiction of the subject matter of a Tesamentary Trustee's Probate accounting of its management of the Trust Estate Corpus—and mistakenly ruled that the Federal Equity Court had acquired jurisdiction, because legatee Cleveland was estopped in the second suit to raise the question of lack of jurisdiction of the subject matter.

And on this question of the lack of jurisdiction of the Federal District Equity Court, the positive rule of this Honorable Supreme Court as announced in *United States*

v. Guaranty Co., 309 U. S. 506, was rejected by the Supreme Court of Michigan.

II. The Supreme Court of Michigan in ruling that the Federal Equity Court had the power to allow such Trustee's counsel fees—confused and misapplied this Honorable Court's ruling in *Sprague v. Ticonic Bank*, 307 U. S. 161, and mistakenly applied it as though the Trust Estate in the Ticonic case was one created by a will (as in the case at bar) whereas, in the Ticonic case the trust was created by a private agreement, of which only a Court of Equity could have jurisdiction.

III. Jurisdiction of the subject matter cannot be conferred upon a Federal Equity Court either by—

(a) Estoppel, (b) consent, or (c) the filing by a defendant of a cross claim or bill.

(a) *Vallely v. Ins. Co.*, 254 U. S. 348.

(b) *Neirbo v. Bethlehem Co.*, 308 U. S. 165 (Syl. 2).

(c) *U. S. v. U. S. Guaranty, etc. Co.*, 309 U. S. 506; *Strandt v. Strandt*, 278 Mich. 354, 358.

IV. A judgment void for lack of jurisdiction of the subject matter is subject to collateral attack and is not *res adjudicata* in a subsequent suit.

U. S. v. U. S. Guaranty, etc. Co., 309 U. S. 506.
Johnson v. Zerbst, 304 U. S. 458.
Vallely v. Ins. Co., 254 U. S. 348.

V. The Federal Equity Court had no power or jurisdiction to order a distribution of assets of an estate, in the hands of a State Probate Court and its duly appointed Executor or Testamentary Trustee.

Byers v. McAuley, 149 U. S. 608.

VI. The Federal Equity Court had no jurisdiction of the subject matter of a Michigan Testamentary Trustee's management of the corpus of the trust during a thirteen year life estate period—especially when the Trustee had been filing annual accounts for years in the State Probate Court.

Princess Lida v. Thompson, 305 U. S. 456.

VII. No equity Court in Michigan, State or Federal, had any jurisdiction over any Estate or Will of a Michigan resident decedent—unless the power of the State Probate Court was "inadequate."

Brooks v. Hargrave, 179 Mich. 136.
Gillespie v. Schram, 108 Fed. (2d) 39 (6 C. C. A.).

In that connection, the finding of petitioner Circuit Judge in his answer to the petition for Writs of Prohibition and Mandamus—(Finding Sixth (1st) Pleading B, page 7—

> "1st—That all determinations and provisions of the said 'Federal Judgment' of February 7, 1939, were within the adequate and full jurisdiction and power of the Probate Court for the County of Saginaw, in the matter of the Estate of Arthur D. Eddy, Deceased, to have decided, determined and provided for."

is conclusive—not having been questioned or issue taken by the Petitioners for Prohibition and Mandamus.

VIII. The Federal Equity Court's judgment of February 7, 1939 (being void as without the jurisdiction of the subject matter) violates the due process of law clause of the Fourteenth Amendment to the Constitution of the United States.

Scott v. McNeal, 154 U. S. 34, 46.

IX. The Federal Equity Court's Judgment of February 7, 1939 (being void as without the jurisdiction of the subject matter) violates the due process of law clause of the Fifth Amendment to the Constitution of the United States, the judgment having been entered under the authority of the United States, and the Fifth Amendment being a restraint upon the judicial power of the United States.

X. The Statutes of Michigan expressly require that all Testamentary Trustees obtain approval of the Michigan Probate Court (appointing them) of all allowances of attorneys or counsel fees.

The Testamentary Trustee has gone into the Probate Court (which appointed it in 1925) in January, 1939—and obtained an allowance of $1,500 of its attorneys fees in this very litigation made the subject of the Federal Equity Judgment of February 7, 1939.

Thereby the Testamentary Trustee had submitted itself on this question of counsel fees allowance to the Michigan Probate Court, and the Federal Equity Court, insofar as it took (by its judgment) the corpus of the Testamentary Trust out of the Probate Court—and undertook to, itself, allow a Testamentary Trustee its attorneys fees—is invalid (*Princess Lida v. Thompson,* 305 U. S. 456).

XI. Legatee Cleveland, made a defendant in a Testamentary Trustee's final accounting suit, had the right (regardless of the Trustee's prior submission of the question to the Probate Court) to have any assessments of attorneys' fees made by the Probate Court, which appointed the Trustee in 1925, and not by either a State or Federal Equity Court (*Taylor v. Sternberg,* 293 U. S. 470).

XII. The Plaintiff Cleveland (legatee, under her Uncle's will of one-sixth of his estate) was made a de-

fendant in the Testamentary Trustee's first suit, commenced in the State Equity Court in 1934, and removed to the Federal Equity Court on the ground of diversity of citizenship (Re *Gray's Estate,* 66 Fed. (2d) 367, 7 C. C. A.).

(a) Despite the Testamentary Trustee's admission (in its amended bill) of heavy losses, which *cestui que* trust Cleveland (as a defendant) had the right to require the Trustee to justify *(Davidson v. Young,* 290 Mich. 266),

the Federal Equity Court entered judgment on February 7, 1939, requiring *cestui que* trust Cleveland to pay all the Trustee's legal expenses and costs except $1,000—which the Federal Judgment required the Charitable Trust to pay.

(b) But the Charitable Trust was not a party to the Federal Judgment and not bound by it.

(c) Now the Testamentary Trustee has taken over $40,000 from the corpus of legatee Cleveland's one-sixth interest—but

(d) *The judgment* of the Michigan Supreme Court of April 20, 1943, absolutely prohibits legatee Cleveland from even asking contribution from the Charitable Trustee of its share of such expenses—in the second suit started by legatee Cleveland in January, 1942, against the Charitable Trust—where it was for the first time a party.

Such Writ of Prohibition amounts to a deprivation of legatee Cleveland's property without due process of law contrary to the Fourteenth Amendment to the Constitution of the United States.

XIII. The Federal Equity Judgment of February 7, 1939, denied to legatee Cleveland—

1—her right under the will to a distribution of one-sixth of the assets of the family company—

2—her right to have any claimed Trustee's fees or expenses allowed by the proper State Probate Court having jurisdiction thereof.

3—her right to submit the question to a Court of competent jurisdiction—whether the Charitable Trust, upon established principles, should contribute a part (more than $1,000) of the Trustee's so-called attorneys' fees and accounting expenses.

Thereby legatee Cleveland was deprived of an "immunity" existing under Federal authority—and subsequently the validity of this Federal Judgment was drawn in question by the judgment of the Michigan Supreme Court of April 20, 1943, which issued a Writ of Prohibition against this petitioner, Reid, and which judgment of the Highest Court of Michigan this petitioner for certiorari is fairly entitled to review *(Avery v. Popper,* 179 U. S. 305, 314, 315) in this Honorable Court.

XIV. The Supreme Court of Michigan directly passed upon a Federal Question by determining that the Federal Judgment of February 7, 1939, was valid—it being an issue of the validity of an authority of the United States *(Factor's Company v. Murphy,* 111 U. S. 738).

XV. The invalidity of a Federal Judgment (for want of jurisdiction) was in issue when the Supreme Court of Michigan treated it as in issue, and thus a Federal Question was presented, reviewable by this Honorable Supreme Court *(German Society v. Dormitzer,* 192 U. S. 125, 127).

WHEREFORE, your Petitioner prays that a Writ of Certiorari issue under the seal of this Court, directed to the Supreme Court of Michigan, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said Court had in the case numbered and entitled on its Docket,

No. 42,067

SECOND NATIONAL BANK & TRUST COMPANY of Saginaw, Michigan, a National Banking Corporation, individually and as trustee under the Ninth and Tenth Paragraphs of the Will of Arthur D. Eddy, deceased, and
CHARLOTTE EDDY MORGAN,
Plaintiffs,
vs.
HONORABLE NEIL E. REID, Circuit Judge of the Sixteenth Judicial Circuit, sitting in and for the County of Saginaw,
Defendant

to the end that this cause may be reviewed and determined by this Court as provided by the Statutes of the United States; and that the Judgment of April 20, 1943, therein of said Supreme Court of Michigan be reviewed by this Court and for such other and further relief as this Court may deem proper.

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United States of America

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SECOND NATIONAL BANK AND TRUST COMPANY, of Saginaw, Michigan, individually, and as Trustee under the Ninth and Tenth Paragraphs of the Will of Arthur D. Eddy, Deceased, and CHARLOTTE EDDY MORGAN, Respondents and Plaintiffs Below

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BRIEF FOR PETITIONER, NEIL E. REID, CIRCUIT JUDGE, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

OPINION OF SUPREME COURT OF MICHIGAN

The opinion is found in the Record as Pleading C.

It is discussed at pages 13 to 16 of the Petition, and in

Part III, Page 31 of this Brief.
Page V, page 35 of this Brief.

II.

JURISDICTION

The date of the Judgment to be reviewed is April 20, 1943, when the judgment of the Supreme Court of Michigan was entered.

Appellate jurisdiction is based upon Section 344 of Title 28 of U. S. C. A. and the Constitution of the United States.

III.

SPECIFICATION OF ERRORS

The errors in the opinion and judgment of the Supreme Court of Michigan, which are relied upon by Petitioner, are set out in the statement of "Reasons Relied Upon for Allowance of Writ" in the accompanying petition for Writ of Certiorari.

Petitioner relies upon and will urge before this Court, all of the errors therein assigned.

IV.

SIX MAIN QUESTIONS FOR DECISION:

FIRST: Did the District Court have jurisdiction of the subject matter under the Trustee's Amended Bill, see Pleading A, page 41 of Record?

SECOND: Was Plaintiff Cleveland estopped to claim in the second suit, the invalidity of the Federal Judgment for lack of jurisdiction of the subject matter?

THIRD: Did the Federal Judgment adjudicate remainderman Cleveland's rights against the Charitable Trust for contribution of claimed Trustee's attorneys' fees, when the Charitable Trust was not a party to the Federal Judgment?

FOURTH: Did the Supreme Court of Michigan have power by its judgment of April 20, 1943, to prohibit *cestui que* trust Cleveland from submitting for decision on the merits in a *second equity suit,* her claim for proper contribution of such trustee's expenses from the Charitable Trust, which was not a party to the Federal Judgment of February 7, 1939?

FIFTH: Is the Supreme Court of Michigan's Writ of Prohibition, denying Remainderman Cleveland the right to try her claim (for the first time) of contribution from the Charitable Trust (a *co-cestui que* trust) a denial of due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States, since it cannot be said that the Federal Judgment of February 7, 1939, is *res adjudicata* as to the other *cestui que* trust, which was not a party to such judgment?

SIXTH: Did the Supreme Court of Michigan have the power to prohibit a trial on the merits in the second suit, of charges of fraud (admitted by the trustee's motion to dismiss) in the procurement and affirmance of the Federal Judgment of February 7, 1939?

In other words—should the Highest Court of a State be permitted to prohibit a trial on the merits of admitted false statements of value of the trust estate corpus, which false statements are admitted (by the motion to dismiss) to have led to an affirmance of the Federal Judgment of February 7, 1939, by the United States Circuit Court of Appeals, without opinion, see 117 Fed. (2d) 1009?

V.

A Statement of Facts sufficient to present the Issues and Questions involved is found in the "Summary Statement of Matters Involved," as contained in the petition for Writ of Certiorari.

VI.

ARGUMENT ON THE LAW

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PART I

Jurisdictional Questions, Arising Under Federal Court Judgments, Are Reviewable.

(a) This Honorable Supreme Court examines questions of jurisdiction of Lower Federal Courts.

U. S. v. Griffin, 303 U. S. 226.

As, for example, a decision of the Highest Court of a State, on a question of jurisdiction of the subject matter arising under a Federal Judgment, which has been pleaded as *res adjudicata* of a State Court action, as in the case at bar.

Stoll v. Gottlieb, 305 U. S. 165.

(b) Federal Judgments pleaded as *res adjudicata* raise Federal Questions reviewable by this Court.

Stoll v. Gottlieb, supra.
Coleman v. Miller, 307 U. S. 433.
Toucey v. Insurance Company, 314 U. S. 118, 129.

And see—

U. S. v. Griffin, supra, where this Court said it must—

> "examine the contention, and if we conclude that the District Court lacked jurisdiction of the cause, direct that the bill be dismissed."

And this Rule applies—even though the jurisdiction was not challenged below—but the cause was tried on the merits, yet all jurisdictional questions will be decided when raised.

And see—

Indianapolis v. Chase Bank, 314 U. S. 63,

where the Circuit Court of Appeals and this Supreme Court had previously held the Federal District Court had jurisdiction—but

on a second certiorari—this Court held there was no jurisdiction.

(c) Where the Highest Court of a State has decided a question of Jurisdiction by a Writ of Prohibition, such decision is reviewed by this Supreme Court upon Writ of Certiorari.

Bullock v. R. R. Commissioner, 254 U. S. 513.

(d) The Validity of a Federal Judgment is always reviewable—when a question of the lack of jurisdiction of the subject matter is presented.

Avery v. Popper, 179 U. S. 305.
Abbott v. Bank, 175 U. S. 409.
U. S. v. Guaranty Co., 309 U. S. 506.
Indianapolis v. Chase Bank, supra.

(e) Federal Questions are held to arise for example, when—

Claims of liability for attorneys' fees on bonds filed in a United States Court are pleaded.

Tullock v. Mulvane, 184 U. S. 497.

Claims against a receiver appointed by a United States Court are made.

McNulta v. Lockridge, 141 U. S. 327.

Claims were made in the Supreme Court of Michigan to land, based upon a Federal Judgment—the Supreme Court of Michigan saying in its opinion that a "contention of plaintiff invoked 'the effect of the decree of the Federal Court.' "

Donohue v. Vosper, 243 U. S. 59, 64.

(f) A State Court's order authorizing suit in the Federal Court—could not confer jurisdiction of the subject matter—which had been withheld by Congress.

U. S. v. Sherwood, 312 U. S. 584.

Nor could a State Statute confer jurisdiction of the subject matter upon a Federal Equity Court.

Kellean v. Casualty Co., 312 U. S. 377 (Syl. 6).
Pusey and Jones Co. v. Hanssen, 261 U. S. 491.
Mathews v. Rodgers, 284 U. S. 521.

PART II

Summary of Leading Decisions on the Principal Jurisdictional Questions Involved.

A.

This Question is ruled by—

U. S. v. Guaranty Co., 309 U. S. 506.
Indianapolis v. Chase Bank, 314 U. S. 63.
Princess Lida v. Thompson, 305 U. S. 456.
Jones v. Harsha, 233 Mich. 409.
Barney v. Barney, 216 Mich. 224.

B.

That the party attacking a judgment for lack of jurisdiction—sought affirmative relief by cross claim—does not render the judgment valid and enforceable.

U. S. v. Guaranty Co., supra.
Strandt v. Strandt, 278 Mich. 354, 358.

See page 33, Part IV, of this Brief.

C.

Final Judgment holding Jurisdiction existed—will be set aside at any time if no jurisdiction existed.

Indianapolis v. Chase Bank, 314 U. S. 63.

Here the Circuit Court of Appeals and this Supreme Court had previously held the Federal District Court had jurisdiction—but

on a second certiorari—this Court held there was no jurisdiction.

This decision seems decisive that lack of jurisdiction of the District Court to enter the judgment of February 7, 1939—*is now* open to be decided—and it cannot be *res adjudicata,* this Court saying:

> "We are thus compelled to the conclusion that the District Court was without jurisdiction. And, of course, this Court by its denial of certiorari, when the case was here the first time, could not confer jurisdiction which Congress has denied."

D.

The Saginaw Probate Court, which appointed the Testamentary Trustee, must allow its counsel fees.

Taylor v. Sternberg, 293 U. S. 470.

The decision cited by the Supreme Court of Michigan, of *Sprague v. Ticonic Bank* (307 U. S. 161) did not involve a testamentary trust at all.

See page 35, Part V of this Brief.

E.

Any Court, State or Federal, may enjoin enforcement of a Judgment procured by Fraud in any other Court, State or Federal.

Marshall v. Holmes, 141 U. S. 589.
Johnson v. Waters, 111 U. S. 640.
Arrowsmith v. Gleason, 129 U. S. 86.
Brown v. Hanson, et al., 103 Fed. (2d) 685, Cert. denied 308 U. S. 571.
Bruce v. Bruce (5 C. C. A.), 263 Fed. 36.
Barnell v. Kunkel (8 C. C. A.), 259 Fed. 394.

PART III

Chicot District v. Bank, 308 U. S. 371, Distinguished.

Although the Supreme Court of Michigan did not in its opinion filed February 23rd, 1943 (pleading C), decide the question of *res adjudicata*—yet that Court spoke of the decision in *Chicot District v. Bank, supra,* as persuasive.

The Supreme Court of Michigan grounded its decision and judgment ordering the Writ of Prohibition solely on the theory that Remainderman Cleveland was estopped to claim in the second case—a lack of jurisdiction of the subject matter in the first case and the Federal Judgment of February 7, 1939.

We have already pointed out that this claim of estoppel is exactly contrary to this Honorable Court's rule laid down and never departed from in—

Vallely v. Insurance Co., 254 U. S. 348.

(a) the *Federal Judgment of February 7, 1939, unlawfully invaded* the exclusive control and jurisdiction of the State Probate Court of and over the Testamentary Trust Estate's assets and corpus.

The Judgment attempted—(1) to take out of the Probate Court Mrs. Cleveland's residuary legacy entirely—to (2) assign it to the remainderman legatee, to (3) put a lien upon it for claimed trustee's attorneys fees, (4) determine the amount of the lien, and (5) impound (away from the control of the Probate Court) the assets of this legacy to the remainderman—without the legacy ever again coming into the State Probate Court.

See the Probate Order of January 22, 1942, attached to Petitioner for Certiorari's answer, as Exhibit A, page 33 Pleading B.

(b) An *"action in personam"* such as the Chicot case (308 U. S.) which goes to final judgment in a Federal Court of competent jurisdiction—with the parties before it—and involves construction of a Federal Statute—

is not a precedent for upholding a judgment of a Court —which has been excluded from jurisdiction by the Power that created that Court, such as the Congress or the Legislature of Michigan.

See—

U. S. v. Guaranty Co., 309 U. S. 506.
Kalb v. Feuerstein, 308 U. S. 433.

(1) *U. S. v. Guaranty Company, supra,* rules the case at bar—

Here suit was had in a Missouri Federal Court by the United States as Guardian of certain Indian Tribes—to recover royalties under a lease of the Indians' coal lands.

The Indians' intervention was in a reorganization proceeding involving the lessee's corporate assignee—and was properly in the Missouri Federal District Court *unless*—

the treaties with the Indians controlled—which required (through Act of Congress) all claims under such leases to be made in the *exclusive jurisdiction of the United States Federal Court in Oklahoma.*

The United States, as Guardian, entered the Missouri Federal Court—asked for the royalties—but final judgment was rendered on the debtor's cross claim against the Indians.

This second action (challenging the Missouri Judgment) was in the Federal District Court of Oklahoma—where Congress had provided the exclusive jurisdiction under the leases should exist.

The Honorable Court's opinion stated:

> "* * * The reasons for the conclusion that this immunity may not be waived govern likewise the question of *res adjudicata.* As no appeal was taken from this Missouri judgment, it is subject to collateral attack only if void. * * *
>
> In the Chicot County Drainage Dist. Case no inflexible rule as to collateral objection in general to judgments was declared. We explicitly limited our examination to the effect of a subsequent invalidation of the applicable jurisdictional statute upon an existing judgment in bankruptcy. To this extent the case definitely extended the area of adjudications that may not be the subject of collateral attack. No examination was made of the susceptibility to such objection of numerous groups of judgments concerning status, extra-territorial action of courts, or strictly jurisdictional and quasi-jurisdictional facts. * * *"

(2) *Kalb v. Feuerstein, supra,* also rules the case at bar.

PART IV

A Judgment Void for Lack of Jurisdiction of the Subject Matter—May Be Attacked Collaterally in Any Court Having the Parties Before It.

U. S. v. Guaranty Co., supra.
Johnson v. Zerbst, 304 U. S. 458.
Kalb v. Feuerstein, supra.
Vallely v. Insurance Co., supra.

Briefly these decisions involved:

(a) *U. S. v. Guaranty Co., supra,* suit by U. S. and Indians in a Missouri Federal Court—excluded by Congress from jurisdiction—decision made in the Oklahoma Federal Court in a new case started to test the validity of the prior judgment..

(b) *Johnson v. Zerbst, supra,* cited by this Court in the *U. S. v. Guaranty* decision.

Habeas Corpus (an admittedly collateral proceeding) to set aside conviction in a Federal Court having no jurisdiction to try the petitioner.

(c) *Kalb v. Feuerstein, supra,* suit resulting in foreclosure decree in State Courts (unappealed from) held void because Congress had placed subject matter in the Bankruptcy Court under the Frazier-Lemke Act.

(d) *Vallely v. Insurance Co., supra,* where Congress had withdrawn jurisdiction to adjudge an insurance corporation a bankrupt—held a judgment of adjudication (unappealed from) was void—even if the Company had consented to the adjudication and thereafter assisted the Trustee in his duties.

Lack of Jurisdiction Is Not Aided or Cured by a Defendant's Cross-Bill or Other Proceeding Asking Affirmative Relief.

Strandt v. Strandt, 278 Mich. 354, 358.

In *Strandt v. Strandt, supra,* the Supreme Court of Michigan's opinion stated:

> "Defendant's cross-bill asked for cancellation of the quit claim deed and for an accounting.

> This appeal is from a decree in favor of defendants.
>
> The agreement, by its language, purports to confer jurisdiction upon the 'circuit court for the county of Allegan, in chancery.'
>
> 'jurisdiction of the subject matter is governed by law and cannot be conferred by consent.' *Halkes v. Douglass & Lomason Co.*, 267 Mich. 600. * * *
>
> Plaintiffs seek specific performance; defendants desire cancellation of their deed and both parties ask for an accounting. * * *'''

And see—

> *U. S. v. Guaranty Co., supra.*

Moreover, no cross-bill in the case at bar was necessary. Trustee sued remainderman Cleveland and by its amended bill admitted large losses in the trust estate. A mere formal answer by defendant Cleveland in the first case was all she needed—the burden of proof was always upon the Trustee. See—*Davidson v. Young*, 290 Mich. 266.

PART V

Trustee's Counsel Fees.

The opinion of the Supreme Court of Michigan relied upon the decision in *Sprague v. Ticonic Bank*, 307 U. S. 161.

But, Petitioner for Certiorari begs to submit that the Ticonic case did not involve at all a Testamentary Trustee's attorneys' fee.

The fees in the Ticonic case were those of a Trustee appointed under a living deed or agreement of trust—no question of the lack of jurisdiction or power of the Federal Court was involved—the case passing on the recovery

from an insolvent National Bank of certain bonds left in trust with it, and certain questions of interest. See 303 U. S. 161.

The General Rule is that compensation and expenses of Trustees and Receivers and their attorneys must be fixed by the Court appointing them.

See—

Taylor v. Sternberg, 293 U. S. 470, Syl. 6 and 7,

where the fees order of another Court was held a nullity.

PART VI

Summary of Fraud Charges—All Admitted by the Trustee's Motion to Dismiss Filed in Second Suit.

The essential Frauds claimed in the bill in the second suit are:

1st—Conspiracy by two Trustees to defeat actions by two *cestui que* trusts for the recovery of money—

for the especial interests of the two Trustees and opposed to those of the *cestui que* trusts.

See paragraphs 34 and 35 of Bill, page 289, of Pleading A, admitted by motion to dismiss.

2nd—False positions assumed by the two Trustees acting together—to convince the Federal Court that the proper judgment *was that* the corpus of the Trusts was the *small par value shares* of the family holding company,

after the two Trustees had misled the two *cestui que* trusts throughout the entire trial that their position was

that the corpus of the trusts was the very valuable assets of the family company.

3rd—False statements of value of the corpus of the Trusts before the Federal appellate court—which both Trustees by active statement and concealment of the true facts—joined in—now admitted by the motion to dismiss—to be totally false.

See paragraphs 31, 32 and 33 of Bill, pages 280 to 288 in Pleading A.

4th—Antagonistic and collusive positions in the Supreme Court of the United States, in the first suit, that:

(a) Mercantile Trust Company was the representative of the *cestui que* trust Doebler Estate and that it had her interests in hand and actually intended to collect all income due her—but that it was honestly convinced the Federal Judgment was correct and that her estate was not entitled to anything further from the Testamentary Trustee.

See paragraphs 34, 35 and 60, pages 289 and 302 of legatee Cleveland's Bill in second suit, admitted by Trustee's motion to dismiss.

Neither Trustee disclosed to the Federal Court or to the two *cestui que* trusts that they were conspiring to defeat their interests and rights because—

if the arrears of $180,000 of unpaid income found due by the audits of the Testamentary Trustee were all recovered —they would be subject to income tax in the one calendar year of recovery—and the Mercantile Trust Company was afraid it might be liable for losses to Mrs. Doebler's Estate in making payment of a larger income tax of possibly $75,000.

The Testamentary Trustee also knew this—and that it might also be liable individually.

So both Trustees deliberately conspired to defeat the entire recoveries that their audits showed were due the two *cestui que* trusts as to legatee Cleveland about $125,000 of her one-sixth interest—and as to the life tenant, her mother, the admitted sum of $180,000.

NO ISSUE of Fraud and Collusion of the two Trustees was ever submitted to the Federal Court—

The Rehearing in the Court of Appeals was asked to protect legatee Cleveland from unjust payment of Trustee's attorneys fees, and it was in answer to the rehearing petition, that the Testamentary Trustee again affirmed its solemn oral argument in February, 1941 (three years after the last audit and appraisal was made as of June, 1938, showing a loss then of $125,000) that legatee Cleveland's share was then, in February, 1941, of the full value of $616,000—See paragraphs 31 to 33 of the Cleveland bill, Record, page 280 of Pleading A, as filed in second suit.

PART VII

Argument on Fraud Charges in Procurement of Federal Judgment.

Please see Appendix to this Brief "A."

PART VIII

Discussion of Supreme Court of Michigan's Opinion Filed February 23, 1943.

Please see Appendix "B."

PART IX

Conclusion of Brief.

A summary of the Trustee's Amended Bill in the first suit (upon which the Federal Judgment was entered) shows:

1st—That the State Probate Court had made a prior construction of Mr. Eddy's will—the amended bill stating:

> "That the annual accounts of said trustee have been made to the Probate Court for the County of Saginaw, and after due and proper notice thereon hearing has been held, and said accounts have been approved, and that the Probate Court for the County of Saginaw, after due and proper notice, has construed Paragraph 10 of said will; * * *."
>
> Pleading A, page 52.

2nd—The Amended Bill tendered a strict Probate Testamentary Trustee's Final Accounting by Prayer E, as follows:

> "E. That this court find and determine as of the date of the creation of said trust fund created under paragraph nine of said Will the value thereof."
>
> Page 53.

3rd—Prayers D, F, G and H all concern the assignment of the residue of the Ninth paragraph Trust Estate, one-half of which was bequeathed to remainderman Cleveland (see Paragraph "Ninth (e)" of Will, Pleading A, pages 31, 32).

This Honorable Court has uniformly held since its decision in the leading case of—

Byers v. McAuley, 149 U. S. 608, 615—

that a Federal Equity Court's attempt to assign the residue of a decedent's Estate in course of probate in a State Court—was a nullity.

There was no dispute as to remaiderman Cleveland being entitled under Paragraph Ninth (e) of the Will —to a one-half of the residuary trust estate created by paragraph Ninth. That being so no jurisdiction existed to—

(a) Pass upon the Trustee's management of the Trust Assets—

Princess Lida v. Thompson, supra.

(b) Or assign the residue.

For in *Byers v. McAuley, supra*, at page 620, this Court held a Federal Equity Court had no power to assign a bequest to a resident Charity, and that such an order of distribution was a nullity.

No more it would seem—could the Michigan Federal Equity Court (1) take possession of the "res" of the Ninth Paragraph Trust—(2) assign one-half of the residue to remainderman Cleveland, and one-half to a *co-cestui que* trust remainderman, the Charitable Trust —and (3) fix a Testamentary Trustee's Counsel fees and apportion such fees all against remainderman Cleveland's one-half share except $1,000 and then (4) require the Charitable Trust to pay such $1,000—when it was not a party to the Federal Judgment of February 7, 1939, and then finally (5) without ever letting the corpus of residue of the Ninth Paragraph Trust re-enter the State Probate Court's control or jurisdiction —direct that it be paid over to the two *cestui que* trust remaindermen.

It is respectfully submitted that Petitioner Circuit Judge should be allowed this Honorable Court's Writ of Certiorari to review the final Judgment of Prohibition of the Supreme Court of Michigan as entered on April 20, 1943.

Respectfully submitted,

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APPENDIX A

Argument on Fraud Charges in Procurement of Federal Judgment.

The appeal of Mrs. Cleveland from the Federal judgment of February 7, 1939—before the Circuit Court of Appeals at Cincinnati was argued in February, 1941.

Mr. O'Keefe, counsel for the Trustee, stated positively and solemnly to the Court of Appeals that since the audits of June, 1938, the corpus of the Ninth Paragraph Trust had made up its losses and that then (at the time of his oral argument in February, 1941) Mrs Cleveland's one-sixth share was worth as much or more than the appraised value of $616,000 at Mr. Eddy's death in 1925.

There appears to be no other reason why the Court of Appeals should have almost immediately after the oral arguments affirmed the lower Court's judgment without opinion. See 117 Fed. (2d) 1009.

The Cleveland Bill so charged (page 280 of Pleading A) and the Trustee's motion to dismiss in the case at bar, so admitted.

General Discussion of Fraud Charges—

The Cleveland Bill of Complaint in the second suit charged fraud, as follows:

1st—False statements of value to the Court of Appeals on (a) oral arguments, and (b) in its answer to petition for rehearing. It was positively asserted that the remainderman's one-sixth interest under the will was in February, 1941 (at the time of submission of the appeal from Judge Tuttle's judgment) actually worth as much

or more than its appraised value of $616,000 in April, 1925, at testator's death.

It was asserted to the Appellate Court in order to obtain an affirmance of the judgment—that at the time of the oral argument, the losses of $124,500 shown in the audits of June, 1938, had been made up and the trust estate consequently had lost nothing.

These false representations by the Trustee are admitted by its motion to dismiss, (*Brachman v. Hyman,* 298 Mich. 344). See paragraphs 31 to 33 of the Bill (R. 280) admitted by motion to dismiss. And see their admission in the Trustee's Answer to the petition for rehearing.

The Petition for rehearing was mainly based on the premise that the remainderman Cleveland should not be compelled to pay all the trustee's attorneys' fees in a case started by the Trustee by an amended bill in March, 1935, (three years before the life tenant died) in which the Trustee admitted losing $150,000 of the legacy. Remainderman Cleveland contended that under *Davidson v. Young* (290 Mich. 266) she, as defendant, was entitled to demand that the Trustee justify the admitted losses—and that she should not be penalized by heavy attorneys' fee allowances—if when the case was tried heavy losses were admitted—

The petition for rehearing asserted to the Court of Appeals that Trustee's counsel on oral arguments stated positively to that Court that:

> "* * * as ground for affirmance of the lower court's said findings and judgment that:
>
> (a) The appellant Cleveland's one-sixth interest in the capital stock of C. K. Eddy and Sons, left her in trust under the Ninth Paragraph of the last will of Arthur D. Eddy, Deceased (R. 8, 10) and

appraised at his death in April, 1925, at the net value of $616,000.

was then—on said final hearing of February 4, 1941—worth as much or more than it was in said April, 1925, namely, $616,000 * * *."

The Trustee's answer to this Petition stated:

"On page 3 of appellant Cleveland's petition for rehearing is found the statement that the trustee bank always admitted large losses to appellant Cleveland's one-sixth interest. This is not so. It has been the position of the trustee bank that the shares of stock in its hands are of greater value than the value in 1925, when Mr. Eddy died. * * *" (Bill, R. 287).

The Cleveland Bill sets up that these statements of fact as to value were false—and knowingly made and led to affirmance by the Court of Appeals—See Cleveland Bill, paragraphs 31, 32, 33, R. 280 to 288.

The Trustee can not be heard to say that it did not intend the Court of Appeals to act upon its statements of value—and cannot claim that the Court did not act upon them—otherwise why an affirmance without opinion?

"* * * The law presumes every man to intend the natural consequences of his acts. No one can be permitted to say in respect to his own statements upon a material matter that he did not expect to be believed; * * *."

Claflin v. Insurance Company, 110 U. S. 81, 95.

2nd—The bill of complaint also charges collusion between the two Trustees.

A. The Bill charged in (Record 280) paragraphs 31, 32 and 50 (admitted by the trustee's motion to dismiss) that—

(1) The Testamentary Trustee (Second National Bank and Trust Company of Saginaw) whose duty it was to pay $180,000 of unpaid income to the life tenant Doebler—and

(2) The Mercantile Trust Company of Baltimore —(the Trustee under Mrs. Doebler's deed of trust of December 24, 1925) whose duty it was to collect this unpaid income for Mrs. Doebler's estate, had both conspired and colluded secretly to defraud their *cestui que* trusts—and defeat their actions to recover from the Testamentary Trustee, and

B. That this conspiracy and collusion only became known to plaintiff Cleveland after the (1) filing by Mercantile Trust Company in the Supreme Court of the United States of its brief in opposition to writ of certiorari asked by Mrs. Doebler's ancillary administrator in Michigan, Howell Van Auken, and (2) in the last year (since the Federal Judgment was finally affirmed) by the filing by both these trustees of their claims for attorneys' fees—which showed their collusive conspiracy to work together to defeat recovery of (a) the $180,000 of income due Mrs. Doebler's Estate, and also of (b) Mrs. Cleveland's losses of $150,000 in her one-sixth legacy.

C. The Bill also charged that this conspiracy was accomplished in this way:

(a) The Mercantile Trust Company intervened before the Federal Court, August 30, 1938, for the sworn purpose of:

"III. That the said Lila Eddy Doebler died on the tenth day of May, 1938, a resident of Baltimore City, Maryland, and a citizen of that State, without having exercised the power of revocation reserved to her in the aforesaid Deed of Trust; your

petitioner is therefore entitled to demand, to sue for and to receive any and all income to which the said Lila Eddy Doebler, deceased, was entitled under the Will of Arthur D. Eddy, deceased, from the date of the execution of said Deed on December 24, 1925, until the date of her death on May 10, 1938."

See the petition of intervention attached as Exhibit A at page 135 of the Federal Record.

(b) To sustain this recovery of $180,000 of income—it was necessary that the Federal Court accountings be made on the theory—and judgment be entered on the ground that (a) the corpus of the two trusts (under Mr. Eddy's will) was the valuable two-thirds of the net $3,700,000 of assets of the family company, and (b) not just two-thirds of the small par value family company capital stock amounting to a par of $83,000. This valuable corpus was exactly the basis and requirement of the Federal Court's accounting order of April 11, 1936, which provided:

"2. The corpus of the estate of Arthur D. Eddy, deceased, consists of all of the property and assets of the corporation of C. K. Eddy and Sons as of the date of the death of the testator, and the value of the corpus of his estate is the net worth of said corporation, less all debts due by the estate, as of the date of the death of the testator."

See Cleveland Bill, paragraph 18, Record, page 273, and

D. The bill of complaint also charged that:

(1) The audits made by the Testamentary Trustee, under this order of April 11, 1936, showed without any dispute that the Testamentary Trustee at Saginaw had not paid $180,000 of income due to Mrs.

Doebler in the years 1925 to 1938—that being the sum the directors of the Eddy family company (appointed by the Testamentary Trustee) had not declared as formal dividends to her—but had used improperly in part to pay losses in the corpus of the trusts, and

(2) That throughout the entire hearing in the Federal Court, the Mercantile Trust Company remained silent and its attorney, Mr. Besimer, made no effort to support the claim for payment of $180,000 to Mrs. Doebler—whom his client, Mercantile Trust Company claimed to represent—and also claimed her ancillary administrator Van Auken had no legal right to represent in this matter of recovery of income, and

(3) That no party ever claimed in the Federal hearing that the corpus of the two trusts was not the valuable assets of the family company—and never claimed the corpus was only the small par value shares.

This last position was the Testamentary Trustee's (Second National Bank and Trust Company) position in its original bill filed in the Saginaw Circuit Court in Chancery in June, 1934, and after removal to the Federal Court—, was completely abandoned by the Trustee's amended bill filed in March, 1935.

See Prayers D, F, G and H (Cleveland bill, paragraph 47, R. 298) which are essentially Probate Accounting prayers based on the position and specific allegations of the Trustee's amended bill—that the corpus of the trusts was the valuable assets of the family company.

(4) The Bill also charged that after all the proofs were in, based on this theory of the accounting order

of April 11, 1936, that the corpus of the trusts was the valuable assets of the family company—

the Federal Court suddenly held that the corpus of the trusts, was the small par value shares. Of course, that holding automatically (a) stopped any recovery of the undisturbed income of $180,000 to Mrs. Doebler's Estate—since the dummy directors had not declared this in the years of 1925 to 1938—and the Federal Court held this directors' action was not intended as a fraud, and (b) stopped any recovery by Mrs. Cleveland of her losses (as shown by the audits of June 30, 1938) of $125,000 in her one-sixth of the assets of the Eddy company—because as the Federal Judgment argued the Trustee had not lost any of the small $10 par value shares of the family company.

Under such plain, admitted facts—it is respectfully suggested to this Honorable Court:

(a) That when the Mercantile Trust Company of Baltimore entered the Federal Court case in August, 1938, upon a petition claiming (1) $180,000 was due Mrs. Doebler's estate and (2) that it, as Trustee under the deed of trust of December, 1925, was entitled to collect this income, that such Trustee's subsequent collusive connivance with the Testamentary Trustee to defeat such recovery is good ground for full inquiry by a Court of Equity, and for the granting of suitable relief on final hearing, if the charges are sustained.

(b) Direct Attack—

The Michigan Court has approved the procedure of the Cleveland Bill—which is a direct attack on the Federal Judgment for want of jurisdiction and fraud.

See—

Reves v. Hillmer, 256 Mich. 239.
Grahl v. Malkemus, 240 Mich. 387.
Raniak v. Pokorney, 198 Mich. 567.

The Court's decision in the Grahl case, is also authority that a fiduciary's false statements of value are a fraud on the Court, as well as on the *cestui que* trust.

APPENDIX B

Discussion of Supreme Court of Michigan's Opinion Filed February 23rd, 1943.

A. No Equity Court in Michigan has any power or jurisdiction over or respecting an Estate of a Decedent, or his Will, or his Estate's Administration—

> unless the remedies of the Probate Court, which admitted the will to Probate, are "inadequate."

All Courts in Michigan and in the Sixth Judicial Circuit of the United States apply this rule—see

> *Brooks v. Hargrave,* 179 Mich. 136.
> *Tussing v. Trust Co.,* 34 Fed. (2d) 312 (District Court of Michigan).
> *Gillespie v. Schram,* 108 Fed. (2d) 39 (6 C. C. A.).

No showing by the Testamentary Trustee, and no Finding by the Supreme Court of Michigan has determined or pointed out that the Saginaw Probate Court, which admitted Mr. Eddy's will to probate and appointed the Testamentary Trustee, did not have full, adequate and complete power and remedies to enter the same judgment as that entered by the Federal Court.

That being so—no jurisdiction of the subject matter existed in the Federal Equity Court.

The recent case of *Svitojus v. Kurant,* 293 Mich. 291, recognized that a Federal Equity Court had no power whatever to decide whether a Testamentary Trustee had lost trust estate assets of an estate in course of Probate in Michigan—following Federal Judge Raymond's dismissal of the Federal Chancery proceedings in which he recog-

nized his Federal District Court, Western District of Michigan, had no power to decide a Testamentary Trustee's negligence in handling the trust assets.

B. The Trustee's amended bill in the Federal Court tendered no issue or question (under the Ninth paragraph of the Will) that the Saginaw Probate Court did not have complete and "adequate remedies" to decide.

The Amended Bill, and not the original bill, decides the question of jurisdiction or lack of jurisdiction.

See—

Journal, etc. Co. v. United States, 254 U. S. 581, 584.

Grubbs v. Smith, 86 Fed. (2d) 275 (6 C. C. A.), Cert. denied 300 U. S. 658.

The Supreme Court of Michigan failed to recognize that the Trustee Bank itself had the Federal Court enter the accounting order of April 11, 1936 (see bill of complaint Record page 273) requiring the Trustee to account for the handling, as testamentary trustee, of the assets of the Family Corporation—and the Trustee Bank—tried the entire *case on that theory.*

No room was left by the amended bill—and the *Trustee Bank's conduct of the case*—for any construction of the will.

It was admitted by all parties that the corpus of the trusts was the assets of the family company and the entire case by and under plaintiff's amended bill was tried upon that theory—*and nothing was left to the Court to construe.*

It also failed to apply the Rule that no testamentary trustee in Michigan has any right to obtain counsel or

other expenses from any court other than the Probate Court that appoints such trustee.

This is so by positive Statute—

Michigan Statutes Ann., Sec. 27.3178 (285) and
Re Grover's Estate, 233 Mich. 467, 476,
Re Horn's Estate, 285 Mich. 145.

And is so by General Law all over the United States—

Taylor v. Sternberg, 293 U. S. 470.

C. The Supreme Court of Michigan in its opinion makes reference to a few matters upon which other facts, merely in the interest of fairness, should be considered:

(1) In its opinion, the Michigan Court mentioned certain fraud "charges" made in a separate Federal District Court opinion and judgment (not here involved) by Mrs. Cleveland's mother's administrator, Howell Van Auken.

There it was charged that the late Arthur D. Eddy of Saginaw defrauded his sister, Mrs. Doebler, in the year 1920 in the following manner:

(a) Mrs. Doebler and Arthur Eddy (sister and brother) were sole heirs of their brother, Walter Eddy, who died intestate in 1918.

(b) Mr. Arthur Eddy was his brother's administrator and he filed a sworn appraisal and inventory in his brother's estate, setting forth his brother Walter's interest in the family corporation (C. K. Eddy and Sons) as worth $1,400,000. Of course, Mrs. Doebler was entitled to one-half as an equal heir.

(c) Arthur Eddy settled with his sister, Mrs. Doebler, on that basis and she sold her one-half in-

terest to her brother Arthur, in her brother Walter's estate, by a contract dated in March, 1920 and attached to which, as an exhibit, was this inventory and appraisal showing the brother Walter's interest to be worth $1,400,000.

(d) In 1938, after the death of Mrs. Doebler in Baltimore, Maryland in May, 1938, an audit was made by Mrs. Cleveland of the books of the family company (C. K. Eddy and Sons) and it was discovered that a secret set of books of C. K. Eddy and Sons existed—that showed Walter Eddy's interest in the family company in March, 1920 (after his death) were actually worth upwards of $2,600,000 instead of $1,400,000.

These books showed also that the entire net assets of C. K. Eddy and Sons were actually worth in March, 1920, at least $4,411,000 instead of about $2,600,000—which was the basis of the false inventory and appraisal filed in the brother Walter's Estate by Arthur Eddy, as his Administrator. And which inventory and appraisal was attached to the sale contract of March, 1920, as an Exhibit.

(e) However, during this audit in 1938, the original income tax return papers of C. K. Eddy and Sons made in the years 1918, 1919 and 1920 to the Federal Government by Arthur Eddy (as President of C. K. Eddy and Sons) were found.

These sworn returns gave the actual net value of C. K. Eddy and Sons as $4,411,000 in 1918.

But the District Judge held nevertheless that Mrs. Doebler probably knew in March, 1920, that the inventory and appraised value of her brother Walter's Estate of $1,400,000 was false—although no reason

was suggested why a sister would sit by knowingly and sign a sales agreement based on one-half of actual value—if she knew about such falsity.

(f) In view of that fraud, Mrs. Cleveland was entitled to such protection as she could get, when the Testamentary Trustee filed in the first suit a bill against her (a resident of California) in 1934 asking a judgment that her one-sixth corpus interest under Mr. Eddy's will (valued at $616,000 in 1925) be held to be a "par value" of $20,833.

(2) The Michigan Supreme Court in its opinion says that (when the Mercantile Trust Company filed a brief in the Supreme Court of the United States) there was "no fraud in its filing a brief in the United States Supreme Court."

No doubt, however, the Michigan Court had forgotten that this Mercantile Trust Company had intervened (indeed forced its way) in the Federal Court case on a sworn petition that it was its duty as a trustee (under the Deed of Trust of December 24th, 1925) to collect the sum of over $140,000 still unpaid by the testamentary trustee, as income due the life tenant, Mrs. Doebler, in the years 1925 to 1938 at her death.

Now—for this Mercantile Trust Company to afterwards conspire and collude (and so admitted by the motion to dismiss) with the Testamentary Trustee, which owed this money to the life tenant, to defeat a judgment for payment of such money by the Testamentary Trustee, seems to any fair mind to be a fraud, which should be fully investigated by a Court of Equity in open court on final hearing.

(3) The Michigan Supreme Court also states in its opinion that the false statement of the present full value of Mrs. Cleveland's one-sixth interest, made to the Court of Appeals by the Trustee's Counsel, could not have misled the Court of Appeals because the record before the Court showed such statement of value by the Trustees' Counsel was false.

But the Court must have forgotten that the record before the Court of Appeals only showed an admitted loss of $125,000 in Mrs. Cleveland's one-sixth interest as of May, 1938, when the life tenant, her mother, died.

The false statement of Trustee's counsel was made in February, 1941, nearly three years afterwards—and was to the effect that during these three years, which had passed since the audits were made in 1938 (showing such losses), the values had so improved that no losses then (in February, 1941, on the arguments before the Court of Appeals) existed.

The Trustee's motion to dismiss admitted such statements of value were false, and the Trustee's Answer to Mrs. Cleveland's petition for rehearing also admitted the making of such false statements.

The Court of Appeals must have denied the rehearing, believing the truth of the now admitted false statements of value. Otherwise why were such statements made by the Trustees' Counsel to the Court of Appeals at all?

UNITED STATES OF AMERICA

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1943

No. 160

NEIL E. REID, Circuit Judge of the Sixteenth Judicial Circuit, sitting in and for the County of Saginaw,

Petitioner and Defendant Below,

vs.

SECOND NATIONAL BANK AND TRUST COMPANY, of Saginaw, Michigan, individually, and as Trustee under the Ninth and Tenth Paragraphs of the Will of Arthur D. Eddy, Deceased, and

CHARLOTTE EDDY MORGAN,

Respondents and Plaintiffs Below.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

ARTHUR D. EDDY died at Saginaw, Michigan, April 22, 1925, leaving a will which was allowed by the Probate Court for the County of Saginaw. Executors were appointed and the Estate was administered under the jurisdiction of that Court. The will created two trusts—paragraph Ninth under which Lila Eddy Doebler was beneficiary for life and Cynthia Mills Cleveland remainderman of one-half on the death of the life tenant and the other one-half went to the trust under paragraph Tenth of the will which from the beginning was a trust for charity. When the Executors had concluded the administration the Probate Court of

Saginaw County on June 21, 1926, made its order of assignment to Second National Bank and Trust Company of Saginaw and George L. Humphrey as Trustees named in the will. The Trustees filed their bond and duly qualified before said Court. The individual Trustee having died in 1932 said Bank has ever since been sole Trustee. Under the law of Michigan Testamentary Trustees are required to account annually to the Court which allowed the will and made the order of assignment. Compiled Laws 15880.

The Trustee on June 8, 1934, filed a bill in the Circuit Court for the County of Saginaw in Chancery seeking construction of the will and instructions and directions. This was removed by Cynthia Mills Cleveland who is a nonresident of Michigan to the District Court of the United States for the Eastern District of Michigan, Southern Division, at Bay City, Michigan. An amended bill was filed by the Trustee in the Federal Court (Pleading A herein 41). Cynthia Mills Cleveland filed a crossbill bringing in several new parties including Charlotte Eddy Morgan, Respondent herein, who was not a beneficiary of the trust (Pleading A herein 68). The issues on the amended bill and the crossbill were litigated at length in the Federal Court and an extended decree made (Pleading A herein 235). Cynthia Mills Cleveland appealed to the Circuit Court of Appeals for the Sixth Circuit which affirmed the decree (117 F. (2) 1009). Application was made to this Court for certiorari which was denied (313 U. S. 594).

Cynthia Mills Cleveland on January 15, 1942, filed a new bill in the Circuit Court for the County of Saginaw in Chancery alleging that—

1. In the former litigation said Circuit Court for the County of Saginaw in Chancery was without jurisdiction (asserting the jurisdiction of the Probate Court

for the County of Saginaw to be exclusive) and hence the Federal Court on removal obtained no jurisdiction and the decree was a nullity.

2. In the proceedings before the United States Circuit Court of Appeals for the Sixth Circuit on the appeal in the former litigation fraud was committed by counsel for the Trustee by making false statements outside the record.

3. In the proceedings before the United States Supreme Court on the application for certiorari there was fraud by the Merchantile Trust Company of Baltimore, Trustee under a Deed of Trust made by Lila Eddy Doebler, life tenant of the trust under paragraph Ninth of the will in suit in that said Mercantile Trust Company submitted a brief opposing the granting of certiorari whereas the bill asserted said Mercantile Trust Company by reason of being trustee of said trust was under duty to support said application.

The Circuit Judge, petitioner herein, refused to dismiss the bill.

Second National Bank and Trust Company individually and as Trustee and Charlotte Eddy Morgan then petitioned the Supreme Court of Michigan (under established practice in Michigan) to grant a writ of prohibition against further proceedings in said suit so brought by Cynthia Mills Cleveland in the Circuit Court for the County of Saginaw in Chancery and to vacate the orders made by and in said Circuit Court in said suit. The grounds set up as the basis for granting the writ of prohibition were that—

1. The Circuit Court for the County of Saginaw in Chancery had jurisdiction on the bill filed by the Trustee which began the former litigation.

2. The crossbill filed by Cynthia Mills Cleveland in the Federal Court brought in Charlotte Eddy Morgan and others not parties to the original bill and not beneficiaries of the trust under the will, and the Probate Court for the County of Saginaw could not possibly have jurisdiction over such additional parties.

3. The alleged fraud before the Circuit Court of Appeals was outside the Record and had been made the subject of a motion for rehearing before said Circuit Court of Appeals and in any event was intrinsic to the proceeding.

4. There could be no fraud in filing the brief before the United States Supreme Court on the application for certiorari. The brief spoke for itself and was open to answer.

The answer to the petition for prohibition set up no federal question whatsoever.

Obviously the question whether the Circuit Court for the County of Saginaw in Chancery had jurisdiction on the first bill (that filed by the Trustee) is solely a question of Michigan law. If it did then the Federal Court had at least the same jurisdiction after removal.

CHARLOTTE EDDY MORGAN was not interested in that question. She was not a party to the bill filed by the Trustee in the Circuit Court for the County of Saginaw in Chancery. She defended a litigation brought against her by crossbill in the Federal Court filed by Cynthia Mills Cleveland. She first became a party to the litigation in the Federal Court. This had the effect of broadening the scope of the litigation beyond that of the original bill by the Trustee.

Freeman v. Bee Machine Co., June 1, 1943, 87 L. ed. 1074.

Whether or not there was fraud before the United States Circuit Court of Appeals in procuring the affirmance of the judgment presents no federal question. There is no claim of fraud in procuring the judgment in the Federal District Court. Even if there were that would not be a federal question.

Whether the trustee of the Doebler trust should have supported rather than opposed the application for certiorari made by Cynthia Mills Cleveland to the United States Supreme Court presents no federal question. Even if Mercantile Trust Company acted contrary to its duty what it did was open and above board. It submitted its brief on the application. Counsel for Cynthia Mills Cleveland had full opportunity to answer the same.

The only attempts made in the petition for certiorari herein to state federal questions are in the last paragraph, page 20, and the last three paragraphs, page 21. It is obvious that these paragraphs state nothing but normal incidents of the judgment of a State court on questions of local law—jurisdiction of State courts as between one another and claimed fraud in the course of litigation.

It is respectfully submitted that there is no basis whatsoever for the granting of certiorari herein.

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Attorney for Respondents.

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SUPPLEMENTAL AND REPLY BRIEF FOR PETITIONER, NEIL E. REID

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SUPPLEMENTAL AND REPLY BRIEF FOR PETITIONER, NEIL E. REID

I. Recently this Honorable Court reviewed, by certiorari, the Supreme Court of Michigan, in *U. S. v. Shaw* (309 U. S. 495) and reversed the Michigan Court's Judgment for lack of jurisdiction.

It would seem reasonable, therefore, that the writ also be granted in the case at bar—when the Supreme Court

of Michigan has failed to follow several specific jurisdictional rules uniformly laid down by this Court. For here, under repeated decisions of this Court, the Federal Equity Court had no jurisdiction to enter judgment winding up an estate pending in the Probate Court for thirteen years.

(a) *Princess Lida v. Thompson,* 305 U. S. 456, passing on an attempted approval of a State Probate Court's testamentary trustee's management and losses.

(b) *Byers v. McAuley,* 149 U. S. 608, setting aside an attempted assignment of the residue of an estate pending in the Pennsylvania Probate Court.

(c) *Taylor v. Sternberg,* 293 U. S. 470, passing on an attempted allowance by a Court (without jurisdiction) of a receiver's attorneys' fees.

II. The basis of the judgment of the Supreme Court of Michigan of April 20, 1943, (review here asked) was that remainderman Cleveland *was estopped* to raise the question of lack of jurisdiction of the Federal District Court, by her failure to raise such question in the Federal Court.

This Court has consistently held that jurisdiction can not be conferred upon the Federal Courts by estoppel or consent.

Vallely v. Insurance Company, 254 U. S. 348.
U. S. v. Guaranty Co., 309 U. S. 506.

III. Lack of jurisdiction of the subject matter of a Federal District Court presents a Federal Question—whether raised in that Court or any other Court—

Stoll v. Gottlieb, 305 U. S. 165.
Indianapolis v. Bank, 314 U. S. 63.
U. S. Guaranty Co., 309 U. S. 506.
Donahue v. Vosper, 243 U. S. 59.

In its opinion in *Donahue v. Vosper, supra,* this Court said:

> "Here the contentions of the parties turn upon the effect of the decree which was rendered by consent in the suit of the United States against the Canal Company, and this makes, it is contended, a federal question.
>
> Defendants, however, assert that the decree does *not present a federal question* and that, besides, it was not claimed or urged as such by plaintiff in the state courts but appears for the first time in the petition for writ of error, and defendants refer to the bill of complaint to sustain their assertion.
>
> But the Supreme Court in its opinion declared that a contention of plaintiff invoked 'the effect of the decree of the federal court.' * * *
>
> The decree, therefore, was made an element in the decision against plaintiff, and it was claimed by him to be an element in his favor. The motion to dismiss is, therefore, denied. * * *"

If there is any uncertainty as to whether a Federal Question exists, this Court will review a State Court Judgment on Certiorari and remand, if necessary.

Minnesota v. National Tea Co., 309 U. S. 551.

IV. REPLY BRIEF AND CORRECTIONS IN RESPONDENT'S BRIEF.

Respondent's Brief is taken up almost entirely with the minor question of claimed fraud in the affirmance on appeal (without opinion) of the Federal Judgment of February 7, 1939, and which subject was raised by Petitioner's application to prevent a waiver thereof.

It is respectfully suggested that Respondent's Brief does not seriously attempt to answer Petitioner's claim:

(1) That the ground of estoppel relied upon by the Supreme Court of Michigan is erroneous, and

(2) That consent can not confer jurisdiction of the subject matter on a Federal Court—either originally or in removal cases.

Turning to Respondent's Brief, we find but seven points discussed,—no one of which could possibly confer jurisdiction of the subject matter where none exists.

(1st) The only point of any consequence raised by respondent's brief is stated on page 4 thereof, as—

> "The answer to the petition for prohibition set up no federal question whatsoever."

But Petitioner's answer in the Supreme Court of Michigan did clearly set up the claim that the Federal Judgment was void, as without jurisdiction of the subject matter, see particularly pages 7 and 28 to 32 of the answer.

Moreover—it is only necessary, as Justice Story said in *Crowell v. Randell,* 10 Pet. U. S. 368, 397, that:

> "* * * it appears by clear and necessary intendment, that the question must have been raised, and must have been decided in order to have induced the judgment. * * *"

In Petitioner's Motion for Rehearing filed in the Supreme Court of Michigan, at pages 2, 3 and 4, the Federal Question of Lack of Jurisdiction of the subject matter is argued at length.

That a Federal Question was clearly raised and involved in the Supreme Court of Michigan's judgment of April 20, 1943, (review here asked) is admitted by the respondent's brief at top of page 3, where it is stated:

"Cynthia Mills Cleveland on January 15, 1942, filed a new bill in the Circuit Court for the County of Saginaw, in Chancery, alleging that—

1. In the former litigation said Circuit Court for the County of Saginaw in Chancery was without jurisdiction (asserting the jurisdiction of the Probate Court for the County of Saginaw to be exclusive) and hence the Federal Court on removal obtained no jurisdiction and the decree was a nullity."

(2nd) The second point made by respondent's brief is that remainderman Cleveland filed a cross-bill in the Federal Court Judgment case.

Even so—a cross-bill or claim could not confer jurisdiction of the subject matter upon the Federal District Court, or any other Court, and it was so held in:

U. S. v. Guaranty Co., 309 U. S. 506;
U. S. v. Shaw, 309 U. S. 495.

The important facts relating to the cross-bill in the case at bar are:

(a) The Testamentary Trustee (appointed by the Probate Court) filed an original bill in the State Equity Court asking judgment that remainderman Cleveland's trust "corpus" valued at $600,000 at testator's death, was only $20,000 par value of a family holding company's nominal shares.

(b) Upon removal to the Federal District Court by defendant Cleveland—the Trustee abandoned such an attempt and filed a clear cut trustee's final accounting bill admitting heavy losses—and asking justification because of the depression.

(c) Remainderman Cleveland answered — asked affirmative relief for such Trustee's negligence and

made the dummy directors of the small family holding company also defendants—if, as stated in the cross-bill, that was necessary to protect her interests against the admitted losses by the Trustee in the trust corpus, consisting of the assets of the family holding company, owned entirely by the testator at his death.

That is all there is to respondent's efforts to distract attention from the lack of jurisdiction of the subject matter of the Federal Court, to enter the judgment of February 7, 1939.

(3rd) Respondent Trustee (bottom of page 4 of its Brief) says that whether the State Equity Court had "jurisdiction on the first bill (that filed by the Trustee) is solely a question of Michigan Law. If it did then the Federal Court had at least the same jurisdiction after removal."

To which claim, Petitioner Reid begs to respectfully reply that—

(1) The Supreme Court of Michigan (as pointed out in Petitioner's main brief at pages 51 and 52) did not decide at all that the Michigan Equity Court had jurisdiction to allow a Probate Court testamentary trustee's final account and assign the residue of an estate pending in the Probate Court.

(2) What the Supreme Court of Michigan did decide was that remainderman Cleveland (by failing in the Federal Court to raise the jurisdictional question) had thereby *estopped* herself to question the validity of the Federal Judgment in a second cause in the State Courts.

(3) It does not follow at all that if the State Equity Court had jurisdiction by the trustee's original

bill to construe a will—that it also had jurisdiction *by the trustee's amended bill* to allow a Probate Court Trustee's final accounting. But the Supreme Court of Michigan did not decide this question at all, as was pointed out in Petitioner's main brief, pages 51 and 52.

On removal, a Federal Equity Court does not have jurisdiction, just because the State Court did, if such was the case.

The Federal Equity Court is a Court of limited jurisdiction—and often on removal does not have jurisdiction —even though jurisdiction existed in the State Court.

See the rule stated in *Armstrong v. Trust Co.,* 126 Fed. (2d) 164 (5 C. C. A.) Syl. No. 4.

(4th) At the bottom of page 4 of Respondent Trustee's brief is cited this court's recent decision in

Freeman v. Bee Machine Co., 87 L. Ed. 1075; ... U. S. ...

on the point that one of the small family holding company's directors was made a party defendant to remainderman Cleveland's cross-bill.

Freeman v. Bee Company, supra, merely holds that where a Federal Court had original jurisdiction, an amendment to the bill might be allowed after removal from the State Court.

The Federal Judgment of February 7, 1939 dismissed this so-called cross-bill stressed so much by the Trustee—and entered the Federal Judgment upon the Trustee's amended Probate accounting bill.

Even had some relief been granted against the cross-defendant director, Mrs. Morgan, it could not validate the Federal Judgment approving the Trustee's final Probate

Accounting and assigning the residue of Mr. Eddy's Estate—an act of assumed jurisdiction expressly set aside by this Court in *Byers v. McAuley,* in 149 U. S. 608.

(5th) At top of page 5 of respondent's brief—it is said that the Cleveland bill in the State Court, challenging the validity of the Federal Judgment, because of claimed fraud in the affirmance of the Federal Judgment on appeal, presents "no Federal Question."

This claim of fraud is only important, if this Court determines there was jurisdiction of the subject matter in the Federal Court, to allow a Probate Trustee's final accounting and assign the residue of the Eddy Estate Trusts. That is the important question on this application, and the one which it seems Respondent's brief avoids discussion of.

But whether or not the Trustee's fraud (admitted by the Trustee's motion to dismiss to have procured the Appellate Court's affirmance of the judgment without opinion) is strictly a Federal Question, the question goes to the validity of an authority exercised under the United States, and may rightly be considered to involve principles usually applicable to all Federal Questions relating to the validity of Federal Judgments.

(6th) On page 5, second paragraph, Respondent Trustee argues that no Federal Question is presented by this Court's denial of certiorari in 313 U. S. 594, after affirmance of the Federal Judgment was had in the Court of Appeals without opinion.

No claim of fraud in the affirmance of the judgment was made or claimed in the petition for certiorari denied in 313 U. S. 594.

Here fraud is admitted by the motion to dismiss the Cleveland bill.

(7th) Finally, on page 5, Respondent argues that the petition for certiorari does not sufficiently point out the presence of federal questions.

In reply, it is respectfully submitted that the petition for Writ of Certiorari distinctly and repeatedly claims—

(1) the Federal Judgment of February 7, 1939, is void as not within the Federal Court's jurisdiction of the subject matter, and that

(2) the judgment of the Supreme Court of Michigan of April 20, 1943, was clearly erroneous in setting up an estoppel against remainderman Cleveland and holding she could not challenge in a second action the validity of the first judgment, as was done in *U. S. v. Guaranty Co.*, 309 U. S. 506.

It is respectfully submitted that the judgment of April 20, 1943, of the Supreme Court of Michigan is opposed to every jurisdictional rule carefully laid down by this Honorable Court limiting the power of a Federal Equity Court to interfere in the administration by the Probate Courts throughout the Country, of the Estates of Deceased Persons.

Respectfully submitted,

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